

**DEPARTMENT OF STATE REVENUE
FIRST SUPPLEMENTAL LETTER OF FINDINGS : 98-0197 RO**

**Sales and Withholding Taxes — Responsible Officer
For Tax Periods: 1996 Through 1997**

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ISSUE

I. Sales and Withholding Taxes — Responsible Officer

Authority: IC 6-2.5-2-1; IC 6-2.5-9-3; IC 6-3-4-8
Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayer protests the Department's determination of responsible officer liability for sales and withholding taxes owed, but not paid, for liabilities generated before June 28, 1996.

STATEMENT OF FACTS

Taxpayer owned fifty-percent (50%) of a corporation that engaged in retail sales. Taxpayer was listed as an officer and director of this corporation. In addition to officer and director duties, taxpayer, managed the store, kept the books, and wrote and signed checks.

In June of 1994, taxpayer relinquished all management responsibilities and quit working in the store. However, taxpayer continued to keep the store's books and write checks on the store's account until April 1995. In June of 1996, taxpayer resigned as officer and director of the corporation.

As an Indiana Registered Retail Merchant, the corporation was required to collect and remit sales tax on sales of merchandise. As an employer, the corporation was required to timely remit withholding taxes. Starting in February 1996, the corporation was late in remitting these taxes. Eventually, the corporation quit remitting the proper amounts.

From these facts, the Department found that taxpayer, as a responsible officer, was personally liable for the unpaid taxes and penalties incurred through June 28, 1996. (See Letter of Findings 04980197.LOF.) Taxpayer has timely requested a rehearing.

I. Sales and Withholding Taxes — Responsible Officer

DISCUSSION

In order to determine which persons were personally liable for the payment of "trust" taxes – in this case, sales and withholding taxes – the Department must find which parties had a duty to remit these taxes to the Department.

The method of determining whether a given individual is a responsible person is the same under the gross retail tax and the withholding tax.... An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department.... *The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. Department of Revenue v. Safayan*, 654 N.E.2d 270,273 (Ind. 1995). (Emphasis added).

In its search for officers and employees who had the authority to authorize such payments, the court in *Safayan* identified three relevant factors:

- (1) the person's position within the power structure of the corporation;
- (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person's employment contract; and
- (3) whether the person actually exercised control over the finances of the business.

Id.

Because taxpayer was an officer (Secretary/Treasurer), director, and major shareholder (50%) in this closely held corporation, taxpayer was strongly presumed to have had a duty to remit these taxes.

Consequently, the Department found:

The sales and withholding tax liabilities at issue were for periods ending February 1996 to October 1997. The information provided to the Department indicates that prior to June 28, 1996, taxpayer occupied the corporate positions of officer and director, and held a fifty-percent (50%) ownership position. Consequently, taxpayer was properly named a responsible officer for those liabilities. However, the evidence also indicates that on June 28, 1996, taxpayer severed all of his ties with the corporation. Therefore, for those liabilities generated from taxable periods beginning after June 28, 1996, taxpayer can not be found to be a responsible officer.

Letter of Findings 04980197.LOF, page 4.

Taxpayer's argument at rehearing focuses on the Department's failure to consider evidence showing that taxpayer – for the assessed periods – no longer could "exercise control over the finances of the business." As taxpayer notes:

[T]he findings correctly indicate that based on the record, the taxpayer as an officer and director was a responsible officer during the period in question, satisfying factor (2) of *Safayan*. However, the finding ignores factors (1) and (3) and the fact that in reality the taxpayer had no power or control to exercise after April 4, 1995, (one (1) year and two (2) months prior to the initial assessment period).

In support, an affidavit was submitted in which taxpayer reaffirmed that he had relinquished all management responsibilities by June 22, 1994, and relinquished all check writing responsibilities – *and no longer had access to the corporate checkbook* – by April 4, 1995. A subsequent review of the corporate tax returns – both sales and withholding – suggests that taxpayer did not – *and could not* – "exercise control over the finances of the business" for the relevant periods as taxpayer no longer had such authority.

The Department finds, therefore, that taxpayer – a corporate officer – has presented sufficient evidence to rebut the presumption of the existence of a duty to remit trust taxes to the state of Indiana.

FINDING

Taxpayer's protest is sustained.